

1 Leslie Halligan
2 Hearing Officer
3 Office of Public Instruction
4 P.O. Box 9121
5 Missoula, MT 59807
6
7

8 **BEFORE LINDA MCCULLOUGH, SUPERINTENDENT OF PUBLIC INSTRUCTION**
9 **STATE OF MONTANA**

10)
11) OSPI 2006-06
12)
13) **FINDINGS OF FACT,**
14) **CONCLUSIONS OF LAW**
15) **AND ORDER**

16 On May 23, 2006 Petitioners, as parents and guardians (“parents”) of their
17 daughter, (“the student”) filed a request for a due process hearing against Respondent
18 (“School District”). Mediation was conducted in August 2006, but was unsuccessful.
19 Leslie Halligan, designated hearing officer, heard this matter on November 8, 9, 10, and
20 13, 2006.

21 The parents were represented at the hearing by Andrée Larose of the Montana
22 Advocacy Program. The School District was represented at the hearing by Robert Stutz of
23 the Montana School Boards Association. [The student] and her mother were present for a
24 portion of the hearing. Both parties called witnesses and introduced evidence.
25

26 The parents called the following witnesses to testify: ****, the school district
27 superintendent during the 2004-05 and 2005-06 school years (“Superintendent”); ****, the
28 School District Special Education Director and psychologist during the 2004-05 and 2005-

1 06 school years ("Special Education Director"); Sheri Simkins (Ms. Simkins"), offered as an
2 expert witness; ****, [the student]'s Special Education Teacher during the 2004-05 school
3 year ("2004-2005 Special Education Teacher"); ****, [the student]'s Special Education
4 Teacher during the 2005-2006 school year ("2005-2006 Special Education Teacher"); ****,
5 [the student]'s Father ("Father"); Nancy Franklin ("Ms. Franklin"), offered as an expert
6 witness; ****, the School District Speech-Language Pathologist or Therapist ("School
7 Speech-Language Therapist"); and Tanya Curtis ("Ms. Curtis"), offered as an expert
8 witness. The School District called the following witnesses to testify: the School District
9 Speech-Language Therapist, the 2004-2005 Special Education Teacher; the 2005-2006
10 Special Education Teacher; the Superintendent; and Linda Maass ("Dr. Maass"), offered
11 as an expert witness.
12

13 The Hearing Officer received into evidence by stipulation or without objection the
14 following proposed exhibits (later referred to by the abbreviation "Ex." or "Exs" with the
15 corresponding number) from the Petitioner: Ex. 1, IEP dated October 17, 2005; Ex. 2, IEP
16 dated April 25, 2005, Addendum to IEP dated October 25, 2004; Ex. 3, IEP dated October
17 25, 2004; Ex. 5, IEP dated November 11, 2003; Ex. 10; Progress Reports for October 17,
18 2005 IEP; Ex. 11, Progress Reports for October 25, 2004 IEP; Ex. 12, pages 36-45,
19 Progress Reports for November 11, 2003 IEP; Ex. 15, Special Education Meeting Notice
20 dated November 17, 2003; Ex. 21, Initial Plan of Treatment for Outpatient Rehab dated
21 October 2, 2006; Ex. 23, OT/PT role notes; Ex. 25, Curriculum Vitae of Tanya Curtis, M.S.,
22 CCC-SLP; Ex. 27, Augmentative Communication Consultation; Ex. 29, School District
23 Letter to parents dated April 27, 2006; Ex. 34, Daily Logs and Ex. 35, School District Policy
24 5090. The Hearing Officer received into evidence by stipulation or without objection the
25 following proposed exhibits from the Respondent: Ex. 224, Letter to parents from Special
26 Education Director dated April 4, 2005; Exs. 489-490, Adaptive P.E. review notes; Exs.
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1 493-495, Speech Therapy review notes; Ex. 496, Occupational Therapy Note dated
2 January 17, 2005; Ex. 622, Handwritten note from 2005-06 Special Education Teacher;
3 Ex. 624, Handwritten note to parents from 2004-2005 Special Education Teacher; Ex. 650-
4 665, Notebook for exchange of communication between home and school, 12-20-05
5 through 5-3-06; Ex. 739, Notes from Education file; Ex. 730-73, Handwritten notes from
6 Parents; Ex. 762, Email from PLUK representative, dated May 2, 2006; Ex. 795, Email
7 from Parents dated May 2, 2005; Ex. 936, Occupational Therapy Report dated May 31,
8 2005; Ex. 939, Physical Therapy Report, dated May 23, 2006; Ex. 940-941, Speech &
9 Language Summary for 2005-2006 dated May 19, 2006; Exs. 947-998, Daily Reports
10 dated May 22, 2006 to April 20, 2006; Exs. 1121-1193 and 1196-1488, which includes
11 Notebook pages, Daily Calendar Comments from School staff, Telephone call log,
12 Handwritten notes; Incidents/Observations/Parent contact, Yes/No Recognitions, Weekly
13 Reports from 2004-2005 School Year; Ex. 2019-2021, Vita from Linda Maass Ed.D, M.A.;
14 Ex. 2325, Update to parents dated March 30, 2006; Ex. 2326, Update to parents, mid-
15 quarter 2005-2006 School Year; Exs. 2341-2343, Speech & Language Progress Reports
16 dated November 5, 2004, April 1, 2005 and June 3, 2005; Ex. 2352-2353, Occupational
17 Therapy Quarterly Note dated January 18, 2006, Occupational Therapy Note dated
18 January 17, 2006.

21 The Hearing Officer received into evidence over objection the following exhibits:
22 Petitioner's Ex. 12, pages 1-35, Progress Reports for November 11, 2003 IEP; Ex. 16,
23 CST dated November 17, 2003; Ex. 22, OPI pamphlet entitled "Transition Services in the
24 IEP" dated March 2002; Ex. 30, Special Education Narrative, June 2001; Ex. 31, School
25 Board Meeting Minutes; Ex. 32, School District Policy 2410 on High School Graduation
26 Requirements; Ex. 35, School District Policy 2420 on Grading and Progress Reports; Ex.
27 37, Montana Advocacy Program Letter to School District dated April 19, 2006; and
28

1 Respondent's Ex. 1194 and 1195, Notes by Special Education Teacher from April 26,
2 2005 telephone call; Ex. 2015, Transcript Report dated August 18, 2006. The Hearing
3 Officer denied admission of Petitioner's proposed Ex. 28, Training Styles (Pam Elder,
4 Phoenix AAC Expo, 1996). The School District proposed Ex. 33, Policy 3121 and it was
5 discussed but not admitted.
6

7 [The student] alleges that the School District has violated her right to a free
8 appropriate public education (FAPE) under the Individuals with Disabilities Act (IDEA), 20
9 U.S.C. § 1400 et. seq. First, [the student] contends [the district's] termination of special
10 education and related services by awarding her a regular diploma and by disallowing her
11 from receiving services beyond age 19 violated her legislative entitlement to continued
12 education and related services under the IDEA. Second, [the student] contends the
13 District failed to provide her with FAPE during the two years preceding her request for due
14 process filed May 23, 2006. [The student] seeks compensatory education as an equitable
15 remedy for this past failure to provide FAPE.
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17 The School District asserts that [the student] was properly awarded a regular high
18 school diploma and properly graduated from the School District, that the School District
19 provided special education and related services well in excess of the FAPE requirements
20 to [the student], and that the matter should be dismissed.
21

22 On August 24, 2006, [the student], through her counsel, filed a motion for stay put
23 under the IDEA, requesting that this hearing officer order that she continue receiving
24 educational services from the School District pending the outcome of these proceedings.
25 The matter was briefed by the parties. The hearing officer determined, given the evidence
26 submitted by the parties, that while the stay put provision would apply to [the student], she
27 had attained the age of 19 and under school district policy, the school district's legal
28 obligation to serve her had ended.

1 Based on the evidence presented at the hearing in this matter and the legal
2 arguments submitted herein, the Hearing Officer makes the following:

3 **FINDINGS OF FACT**

4 1. [The student] is a young woman, born August 31, 1987, currently age 19,
5 who resides in the family home within the geographic boundaries of the School District.
6 She enjoys social outings and is family oriented. Her parents are her legal guardians.
7

8 2. [The student] was born with cerebral palsy, which is currently diagnosed as
9 Athetoid Cerebral Palsy. This condition has impacted her physical abilities to
10 independently be mobile and care for her personal grooming. Her level of cognitive
11 impairment has not been established because her physical disabilities render evaluators
12 unable to administer standardized intelligence testing and obtain accurate results.
13 Through observation and adapted assessment, educators have determined that she does
14 have a cognitive impairment. Exs. 3, 5, 21.
15

16 3. [The student] moved with her family into the School District in 2000. In
17 October 2000, the School District initially developed an IEP for [the student] that was to be
18 effective for her ninth grade year, 2001-2002, at the School District. This initial IEP
19 mentioned a comprehensive evaluation of [the student] had been done in December
20 1997. At that time, [the student]'s parents waived the usual three year testing required for
21 special education students. Ex. 16.
22

23 4. The School District identified [the student] as eligible for IDEA services under
24 the following qualifying conditions: cognitive delay, emotional disturbance, orthopedic
25 impairment, other health impairment, speech language impairment and traumatic brain
26 injury. Ex. 16.

27 5. [The student]'s high school education at the School District was controlled by
28 successive individualized education programs (individually, "IEP") developed by her IEP

1 team, whose composition varied from year to year but, during the 2004-05 and 2005-06
2 school years, included at least the appropriate school officials, the parents, and one or
3 more representative for the parents and [the student].

4 6. [The student]'s IEP dated November 11, 2003, was entered into evidence.
5 Ex. 5. This IEP set forth the goals and objectives for the 2003-2004 school year. It
6 reflects notations that [the student]'s parents were concerned about communication and
7 behavior. The minutes of the meeting indicate that all of the goals were reviewed and
8 were approved by the team. The recommended amount of speech therapy was 45
9 minutes a week; occupational therapy was 30 minutes a week; and physical therapy was
10 45 minutes a week. Transition services were reviewed and agreed upon by the IEP team.
11 The team agreed that transition services at that time would not include employment or a
12 functional vocational assessment. The IEP was approved by team, including [the
13 student]'s parents. However, [the student]'s Father testified that he was unaware that the
14 graduation date of May 2005 was in the November 11, 2003 IEP. He believed that the
15 graduation date was inserted into the IEP without his knowledge and without discussion at
16 the IEP meeting. Testimony Father, Tr. 201:15-203:11, Vol. II, Nov. 9, 2006.

17 7. In addition to including a projected graduation date of May 2005, [the
18 student]'s November 11, 2003 IEP lists each of the four years of high school and
19 designates the traditional designations for each year, for example her Freshman year was
20 considered School Year 2001-2002; Sophomore year, School Year 2002-2003, etc.
21 Although there was a section for the listing of classes and/or credits, no classes or credits
22 were listed in the November 11, 2003 IEP. Ex. 5, p. 12.

23 8. The IEP team convened on October 25, 2004 and completed an IEP for [the
24 student] for the period from October 25, 2004 through October 25, 2005. Ex. 3. In this
25 IEP, the projected graduation date was May 2006. Ex. 3, p. 17. The parents approved the
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1 IEP with an exception for the “graduation date and school policy regarding the student’s
2 age.” Ex. 3, p. 19. With regard to Extended School Year Services, the IEP team noted the
3 need to collect additional data and meet again by May 15, 2005. The IEP team also
4 agreed to meet again by May 15 to resolve the differences regarding the exceptions noted
5 by the parents. Ex. 3, p. 2.

6
7 9. The minutes of the October 25, 2004 IEP meeting reflect discussion about
8 the parents’ desire to keep [the student] in school as long as possible (“until she turns 21
9 years old”), the school district’s change in policy to reflect alignment with state law and the
10 school district approval of [the student] to have a 5th year of high school. Ex. 3, pp. 21-22.

11 10. Numerous documents for the 2004-2005 school year, including a daily
12 communication notebook, calendar comments from school district staff, a telephone call
13 log, handwritten staff notes, goal work notes, and daily logs, were entered into evidence.
14 Exs. 1121-1148.

15
16 11. Handwritten notes in [the student]’s file from the 2004-05 school year
17 document additional activities provided to [the student] and the development of skills not
18 specified in her IEP but consistent with the goals and objectives of her IEP, as well as
19 effort made by the School District to assist the parents in contacting outside agencies
20 regarding [the student]’s special education and related services. Ex. 739.

21 12. In an effort to address the concerns of [the student]’s parents about the
22 proposal to graduate [the student] in May 2006 and for the purpose of discussing extended
23 school year services, an IEP meeting was held April 25, 2005. The District Superintendent
24 attended the April 25, 2005 meeting, received information from the IEP team that [the
25 student] would likely benefit from an additional year of education, and granted [the student]
26 a fifth year of high school education based on Policy 5090 passed by the Board of
27 Trustees in December 2004. The Superintendent emphasized, however, that educational
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1 services would terminate in May 2006 because [the student] had already met the
2 graduation requirements, i.e. the number of credits required for graduation and she had
3 been making satisfactory progress on the goals and objectives set forth in her IEP. Ex. 2.
4 Testimony Special Education Director, Tr. 124:20-124:35, Vol. II, Nov. 9, 2006.

5 13. At this April 25, 2005 meeting, [the student]'s parents submitted a letter
6 outlining their concerns. Petitioner's Ex. 2, p. 4. In this letter [the student]'s parents
7 indicated their desire for an extension of her education, based on her inability to meet the
8 goals and objectives of her IEPs. They noted that her lack of progress may have been the
9 result of her absences because of a protracted illness last spring, other illness and ongoing
10 behavior issues. They identified recent progress reports with unsatisfactory progress on
11 almost every goal, noting that some of the goals had been "scaled down." They also
12 requested more therapy services that she had been receiving, noting that this request had
13 not been made because they were under the impression that she had until the age of 21 to
14 meet her goals and objectives. They emphasized the need for communication and noted
15 that the "Go Talk" kept breaking down and the "Freestyle" was rarely used. With regard to
16 transition services, they noted that the IEP should have a more comprehensive transition
17 plan. Ex. 2, p. 4.

18 14. Throughout [the student]'s enrollment at the School District, her parents
19 repeatedly identified communication as a top educational priority and concern. Ex. 1, p. 1;
20 Ex. 2, pp. 4, 6; Ex. 3, p. 1; Ex. 5, p. 1; Testimony Father, Tr. 191:25-193:23, Vol. II, Nov. 9,
21 2006.

22 15. The IEP minutes for the April 25, 2005 meeting summarize some of the IEP
23 team's discussion of the issues identified by the parents in their letter. The IEP team, as
24 reflected in the IEP, determined that Extended School Year Services were not necessary.
25 It appears from the notes that the Superintendent again explained that School District
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1 policy would permit [the student] to receive another year, a 5th year, of high school
2 because school district policy allowed the superintendent discretion to grant an additional
3 year of school if the student had not yet reached 19 years of age. As to the
4 communication issues, the IEP team minutes reflect that the School District had found
5 someone who could providing training on the FreeStyle, one of the augmentative
6 communication devices and its use. The School District personnel indicated that efforts
7 would be made before the end of the school year to obtain this specialized assistance.
8 Petitioner's Ex. 2, pp. 5, 8. Notes prepared in May 2005 by the School District indicated
9 that efforts were made to explore different augmentative communication devices and
10 techniques to meet [the student]'s communication needs. Ex. 23; Testimony Special
11 Education Director, Tr. 142:24-144:8, Vol. I, Nov. 8, 2006.

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13 16. Soon after the April 25, 2005 IEP meeting, the School District requested a
14 consultation from Tanya Curtis, M.S. CCC-SLP, a Speech Language Pathologist. This
15 consultation occurred on May 9, 2005. During the consultation, Ms. Curtis offered
16 recommendations for use of low tech communication systems, such as communication
17 boards, the use of a technique called "Partner Assisted Scanning," step scanning, the use
18 of visual encoding, and modifications to the FreeStyle communication device. With regard
19 to the changes to the FreeStyle, it was recommended that a consultation once or twice a
20 month occur for six to twelve months to improve the use of the FreeStyle augmentative
21 communication device with the software that had been used. Ex. 26, first page dated May
22 9, 2005, pages 2-4 dated May 31, 2005. Testimony of Special Education Director, Tr.
23 144:11-145:11; Vol. 1, Nov. 9, 2006; Testimony of Ms. Curtis, Tr. 57:7-62:25, Vol. III, Nov.
24 10, 2006.

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27 17. After receiving this Augmentative Communication Consultation, the School
28 District Speech-Language Therapist met with Ms. Curtis and developed a new folder for

1 [the student] to use with her FreeStyle device. Petitioner's Ex. 27. An extensive amount of
2 time was necessary to develop the new materials and Ms. Curtis suggested that
3 preprogrammed vocabulary options be purchased that would be appropriate for [the
4 student] and would be less time consuming. Ms. Curtis also recommended training for
5 school personnel regarding methods of enhancing [the student]'s communication and to
6 better understand, program and use high tech communication systems. Ex. 26.
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8 18. The School District Speech-Language Therapist testified that she worked to
9 implement two recommendations from Ms. Curtis. However, the School District Speech-
10 Language Therapist stated that she did not distribute copies of the Augmentative
11 Communication Consultation to the parents or to the IEP team members. The School
12 District implemented the use of a knee switch and a change from auto-scanning to step-
13 scanning for making choices. Testimony Speech-Language Therapist, Tr. 23:6-31:24, Vol.
14 III, Nov. 10, 2006; Testimony Ms. Curtis, Tr. 106:14-107:8, Vol. III, Nov. 10, 2006.
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16 19. There was no evidence presented to indicate that the recommendations
17 provided in Ms. Curtis' Augmentative Communication Consultation sought by the School
18 District were transmitted or considered at the next regularly scheduled annual IEP meeting
19 held October 17, 2005. Testimony Speech-Language Therapist, Tr. 33:16-34:3, Vol. III,
20 Nov. 10, 2006.

21 20. At the IEP team meeting on October 17, 2005, [the student]'s parents again
22 emphasized that communication was a priority for [the student] It was noted that problems
23 with her high tech communication device not working had been a frustration. The IEP
24 team reviewed [the student]'s goals and approved them. As to Transition Services, the
25 notes indicate that [the student] had sufficient credits to graduate, "will graduate May 28,
26 2006" and then some discussion was had about what [the student] wanted to do after
27 graduation. Ex. 1, Bates Stamp 0000373-0000375. [The student]'s postsecondary goals
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1 were identified as #1 Intensive Group Home; #2 Supported Employment; #3 Age and
2 Interest Recreation. Ex. 1, Bates Stamp 0000360. Additionally a listing of [the student]'s
3 transcript information was provided (Ex. 1, Bates Stamp 0000359), indicating that [the
4 student] passed all of her courses and received 6 credits for each year of high school, for a
5 total number of credits of 24 at the end of the 2004-2005 school year. The High School
6 Graduation page had been marked to indicate that [the student] "will meet the district's
7 graduation requirements, **or** will substantially complete the measurable annual goals and
8 will not need new measurable annual goals." Ex. 1, Bates Stamp 0000361, emphasis in
9 original. The IEP team did not consider Extended School Year services because "Student
10 will no longer be in high school due to 5-28-06 graduation date." Ex. 1, Bates Stamp
11 0000372.
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13 21. The parents' objection to the proposed graduation date, as indicated by their
14 qualified signature on the October 17, 2005 IEP, indicated their concerns that [the student]
15 would not have received the educational and related services necessary to develop the
16 skills she would need to transition effectively from high school to post-school life. One of
17 the parents' concerns was that [the student]'s IEP goals had been reduced to "bite-size
18 pieces" at the recommendation of 2004-2005 special education teacher, with the
19 expectation that [the student] would work her way back up to meet higher, more
20 challenging expectations. However, the reduced goals became the ultimate goals, which
21 the District later relied upon to support their decision to graduate [the student]. The
22 parents felt betrayed by the teacher and the School District when this occurred, and
23 disagreed with the low expectations becoming the ultimate goals for [the student] to
24 achieve in order to graduate. Testimony Father, Tr. 199:9-200:4, 207:14-208:8, Vol. II,
25 Nov. 9, 2006.
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1 22. On or about April 18, 2006, the parents of [the student] telephoned the
2 Superintendent and requested an IEP meeting to address the issue of [the student]'s
3 graduation date of May 28, 2006. Ex. 29.

4 23. In response to the telephone request, the School District Superintendent
5 prepared a letter, dated April 27, 2006, in which he stated that the School District declined
6 to convene an IEP meeting to discuss the graduation date for several reasons, which were
7 stated as follows:
8

- 9 • Setting the graduation date is done with School Board approval of the
10 School District's calendar, not when an individual would like that date
11 to be. As expressed during the April 25, 2005 IEP meeting, an IEP
12 does not supercede School Board approval nor does it supercede
13 School District Policies. As these are School Board decisions and
14 approved School District Policies, an IEP cannot change the School
15 Board's decisions of when graduation will take place nor School
16 District Policies.
- 17 • [(The student)] met [School District] graduation requirements at the
18 conclusion of her fourth year in high school (2004-2005 school year)
19 with 24 earned credits (23 credits are required for graduation). Per
20 School District Policy 5090 (copy enclosed), the satisfying graduation
21 requirements for students with disabilities will be interpreted as: Four
22 years of attendance in grades 9-12 or equivalent in a non-graded
23 classroom; Progress on the student's IEP each year sufficient to meet
24 graduation requirements; or Meeting the credit requirement of the
25 [School District]. The Superintendent noted that [the student] has met
26 all requirements for her May 2006 graduation.
- 27 • School District Policy 5090 states that every resident of the District
28 who satisfied the minimum entry age requirement and is less than (sic)
19 years of age on or before September 10 has the right to enroll and
attend the District's schools. As stated above, [(the student)] will be
19 years of age on August 31, 2006 which will no longer meet the
School District's Policy 5090 age requirement for attendance.
- School District Policy 5090 does say that under certain extenuating
circumstances, the Superintendent may grant the privilege of an
additional year of high school when the student is a resident of
[School District] and the educational needs of the student can be met
within the District's existing educational program. This privilege was
extended to [(the student)] for the 2005-2006 school year only (noted
in the April 25, 2005 addendum to the October 25, 2004 IEP
document) with the understanding that this privilege would not be
available after the 2005-2006 school year and that [(the student)]

1 would graduate in May 2006 as noted on the October 25, 2004 IEP
2 and October 17, 2005 IEP documents. As another point of reference,
3 the November 11, 2003 IEP document notes a graduation date of May
4 2005 or at the completion of [[the student]'s] 2004-2005 school year
(her 4th year of high school).

Ex. 29.

5 24. The Superintendent indicated that the School District's policy did not provide
6 for continuing educational services to students over the age of 19. In the past 10 years he
7 was aware of three students who had been over the age of 19 who had received
8 educational services from the School District. Testimony Superintendent, Tr. 73:19-74:9,
9 Vol. 1, Nov. 8, 2006.
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11 25. It is apparent from the School District's letter of April 27, 2006 that the School
12 District made an effort to more thoroughly explain that [the student] would no longer meet
13 the required age of attendance for mandated education by the School District during the
14 2006-2007 school year because she would attain age 19 on or before September 10,
15 2006. Ex. 29.
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17 26. Although the District indicated on the high school graduation form which was
18 part of the October 17, 2005 IEP that the IEP team had determined that [the student] will
19 meet the district's graduation requirements, or will substantially complete the measurable
20 annual goals and would not need new measurable annual goals before graduation in May
21 2006, the IEP team anticipated this outcome but did not actually make this determination.
22 The parents of [the student], as members of the IEP team, repeatedly objected to the
23 proposed graduation date based on their desire to have her education continue beyond
24 age 19, and their concern that [the student] had not progressed enough educationally to
25 graduate. Testimony Father, Tr. 208:9-18, Vol. II, Nov. 9, 2006.
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1 27. Prior to graduating [the student] from high school in May 2006, the District
2 did not convene an IEP meeting for the purpose of reviewing [the student]'s progress
3 towards her IEP goals and objectives, determining whether she would meet graduation
4 requirements and determining whether she would need new IEP goals and objectives
5 before graduation. The District declined the parents' request for an IEP meeting. Ex. 29.
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7 28. [The student]'s school transcript indicates that she earned 24 credits toward
8 the graduation requirement by the end of the 2004-05 school year, and that she earned 31
9 credits toward the graduation requirement by the end of the 2005-06 school year. Ex.
10 2015.

11 29. School District Policy 5090 had been adopted December 14, 2004, when [the
12 student] was in her third year of high school. Ex. 31. Testimony of Superintendent, Tr.
13 34:10-35:25, Vol. I, Nov. 8, 2006. This document does not identify age as a graduation
14 requirement. This policy indicates that graduation requirements for special education
15 students will be interpreted as "Four years of attendance in grades 9-12 or equivalent in a
16 non-graded classroom; and Progress on the student's IEP each year sufficient to meet
17 graduation requirements; or Meeting the credit requirement of the [School District] for
18 graduation." Ex. 36, pp. 1-2.
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20 30. Prior to the adoption of Policy 5090 and when [the student] entered high
21 school in Fall 2001, the School District had in place Policy 2161. This policy stated:
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23 The District shall provide a free appropriate public education and necessary
24 related services to all children with disabilities, birth through 21 years of age,
25 residing with the District, as required under the Individuals With Disabilities
Education Act (hereinafter "IDEA") and implementing provisions in Montana
law, and the Americans With Disabilities Act.

26 Petitioner's Ex. 30, p. 7.
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1 31. In addition to this policy, a School District Special Education Narrative, had
2 been provided to the Montana Office of Public Instruction (OPI) as a prerequisite for
3 receiving federal funds. This Narrative had been adopted by the District Board of Trustees
4 July 10, 2001 and in effect at the time [the student] entered high school in the fall of 2001.
5
6 Ex. 30.

7 32. The Narrative, in its opening section, specifically states that School District
8 Policies 2161 and 2161P, "identify the age range, 3-18 years of age, for which education is
9 provided to all students." Ex. 30, p. 1.
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11 33. Both School District Policy 2161 and the Program Narrative can be
12 interpreted to grant the School District discretion to provide special education services to
13 students who are nineteen in the high school special education program and that services
14 may be available to students through age 21. Neither policy indicates that the School
15 District is mandated to or intended to provide special educational services to students
16 through age 21.
17

18 34. School District Policy 2410 addresses High School Graduation Requirements
19 and provides, in relevant part: "The Board will establish graduation requirements which, at
20 a minimum, satisfy those established by the Board of Public Education (A.R.M. 10.55.904
21 and 905). . . . A student with a disabling condition will satisfy those competency
22 requirements incorporated into the individualized education program (IEP). Satisfactory
23 completion of the objectives incorporated into the IEP will serve as the basis for
24 determining completion of a course." Ex. 32, p. 1.
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27 35. School District Policy 2410P addresses the awarding of credits and provides:
28 "Students shall be expected to earn a total of twenty-three (23) units in order to complete

1 graduation requirements. Special education students who have successfully completed
2 their IEP leading to completion of high school will be awarded a diploma.” Ex. 32, p. 2.

3 36. The decision to graduate [the student] in May 2006 may have reflected the
4 School District’s interpretation of its policy based on the credits assigned to her, but it did
5 not permit the IEP team to discuss whether [the student] had made sufficient progress on
6 the goals and objectives of the IEP in effect for the 2005-2006 school year so that she
7 should graduate with a diploma. Ex. 1, p. 18; Ex. 2, p. 6-7; Ex. 29; Testimony Special
8 Education Director, Tr. 130:8-131:15, Vol. I, Nov. 8, 2006; Testimony Father, 214:19-
9 215:25, Vol. II, November 9, 2006.

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12 37. At the Due Process hearing in this matter, Ms. Curtis testified for [the
13 student] as an expert in augmentative communication needs, services and devices. Ms.
14 Curtis has been awarded a Certificate of Clinical Competence from the American Speech,
15 Language and Hearing Association and has specialized in augmentative communication
16 for the past 16 years. Testimony Ms. Curtis, Tr. 52:16-53:13, Vol. III, November 10, 2006;
17 Petitioner’s Ex. 25. As noted earlier, the School District sought the opinion of Ms. Curtis as
18 an expert in the field of augmentative communication needs and service. Testimony
19 Speech-Language Therapist, Tr. 10:1-5, Vol. III, Nov. 10, 2006. Ms. Curtis has contracted
20 with school districts and has extensive experience in evaluating, designing and working
21 with interdisciplinary teams to implement augmentative communication services for
22 persons with significant disabilities. Testimony Ms. Curtis, Tr. 116:9-22, Vol. III, Nov. 10,
23 2006.

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25 38. Prior to conducting her initial assessment in 2005, Ms. Curtis met with
26 members of [the student]’s educational team, special education teacher, the
27 paraprofessional classroom aide(s), speech and language pathologist, Special Education
28

1 Director, [the student]'s mother and [the student]. She also directly worked with [the
2 student] on a variety of communication devices, inspected her devices and observed [the
3 student] in the school setting. Testimony Ms. Curtis, Tr. 57:5-59:12, Vol. III, Nov. 10, 2006.

4 39. Ms. Curtis conducted a second evaluation of [the student]'s augmentative
5 communication needs and abilities on September 26, 2006 at the request of [the student]
6 for purposes of the Due Process hearing. At that time, Ms. Curtis also reviewed [the
7 student]'s education records and transcripts of depositions of [the student]'s teachers
8 during her last two years of high school. Testimony Ms. Curtis, Tr. 81:4-82:3, 134:3-135:6,
9 Vol. III, Nov. 10, 2006.

11 40. Ms. Curtis indicated that the School District had been making efforts to
12 provide low tech, mid-tech and high tech communication systems for [the student]. She
13 identified the School District's use of a variety of augmentative communication devices and
14 techniques with [the student], including a FreeStyle device, knee switch, Jelly Bean switch,
15 Go Talk device, facial expression/body language, communication boards of varying
16 complexity, eye gazes, yes/no signaling, grunting, reaching/pointing, and an Intellikeys
17 keyboard used with a computer. She further noted that [the student] had fairly good
18 pragmatic communication skills, some word recognition and beginning spelling skills, and
19 strong nonverbal communication skills. Ms. Curtis noted, "[The student] was very specific
20 in requesting what she wants, and is able to clarify which location/item through yes/no
21 questions." Ex. 27.

23 41. Ms. Curtis testified that the School District personnel, to the best of their
24 ability, were attempting to do what was right for [the student] and her communication
25 needs. Testimony of Ms. Curtis, Tr. 122:3-7, Vol. III, Nov. 10, 2006.

27 42. Additionally, [the student]'s communication skills were sufficient to allow her
28 to communicate with people who know her and who are trained in how to use her low-tech

1 eye gaze boards; they were not sufficient to allow her to communicate with unfamiliar
2 people in a variety of settings. Testimony Ms. Curtis, Tr. 135:12-19, Vol. III, Nov. 10, 2006.

3 43. After the more comprehensive review of the [the student]'s needs in 2006,
4 however, Ms. Curtis identified problems with limited training of district personnel regarding
5 the proper use of augmentative communication devices, the failure to maintain [the
6 student]'s augmentative communication devices; failure to program her communication
7 devices with sufficient vocabulary and activity-based communication pages to enable her
8 to be an active, reciprocal communicator rather than a passive communicator, and the
9 need to provide more than 30 minutes of speech therapy per week. Testimony of Ms.
10 Curtis, Tr. 95:16-107:8, Vol. III, Nov. 10, 2006.

11 44. The School District attempted to utilize augmentative communication devices
12 with [the student], but was unable to develop [the student]'s functional ability to
13 communicate using these devices. A primary reason for this is that the effective use of
14 these devices requires specialized experience and training. Additionally, many of the
15 communication devices required specialized programming to be effective for [the student]'s
16 needs. Testimony Ms. Curtis, Tr. 89:6-91:15, 95:23-96:23-98:7, 112:12-16, 122:3-7, Vol.
17 III, Nov. 10, 2006.

18 45. As part of the second evaluation, Ms. Curtis inspected the FreeStyle device
19 and found that it still had vocabulary appropriate for elementary and middle school
20 students, which may have been programmed into it before [the student] moved to Montana
21 in 2000, and did not have vocabulary appropriate for [the student] as a high school
22 student. Testimony Ms. Curtis, Tr. 66:14-25, 137:1-16, Vol. III, Nov. 10, 2006. In addition
23 to the lack of functional vocabulary, the high-tech device was not programmed so that [the
24 student] could access the vocabulary on her own; she was often dependent upon staff to
25 change pages or otherwise assist her. Testimony Ms. Curtis, Tr. 69:10-13, 84:18-85:13,
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27
28

1 Vol. III, Nov. 10, 2006; Testimony 2004-2005 Special Education Teacher, 214:1-25, Vol.
2 III, Nov. 10, 2006.

3 46. During the May 2005 meeting that Ms. Curtis had with the School District
4 Speech-Language Therapist, a new activity-based page about bowling was developed for
5 [the student]'s Freestyle augmentative communication device. However, Ms. Curtis it was
6 not demonstrated to the classroom teacher or the paraprofessional aide how to access the
7 bowling page, the bowling page was not linked to [the student]'s main page so she could
8 access it independently, and there is no evidence the bowling page was ever used.

9
10 Testimony Speech-Language Therapist, Tr. 21:19-22:19, Vol. III, Nov. 10, 2006;

11 Testimony Ms. Curtis, Tr. 83:15-84:8, Vol. III, Nov. 10, 2006.

12 47. Ms. Curtis indicated that she anticipated that after the consultation she would
13 begin to work with the School District to provide a more functional vocabulary for [the
14 student]'s communication device, however the School District did not contact her after the
15 initial meeting on May 9, 2005. Testimony Ms. Curtis, Tr. 79:22-80:12, 113:8-12, Vol. III,
16 Nov. 10, 2006.

17
18 48. The School District Speech-Language Therapist indicated that she did not
19 implement all of the recommendations of Ms. Curtis, but focused on the knee switch and
20 step scanning approach to increase [the student]'s access to the vocabulary and programs
21 in the high-tech augmentative communication devices. While this made scanning much
22 easier for [the student], it did not significantly increase her functional communication skills.
23 Testimony Speech-Language Therapist, Tr. 23:22-24:6, Vol. III, Nov. 10, 2006; Testimony
24 Curtis, Tr. 110:22-112:6, 104:10-105:6, Vol. III, Nov. 10, 2006.

25
26 49. To achieve improved functional communication skills, [the student] needed
27 consistent and frequent consultations with a skilled, experienced professional with
28 expertise in augmentative communication. Augmentative communication is an area that

1 requires expertise. Testimony Ms. Curtis, Tr. 69:17-23, Vol. III, Nov. 10, 2006; Ex. 26.

2 Without changing what the school was doing, it was predictable and expected that [the
3 student] would not make significant progress toward developing enhanced communication
4 skills. Testimony Ms. Curtis, Tr. 109:23-110:19, Vol. III, Nov. 10, 2006; Ex. 26.

5 50. Given appropriate instruction and related services by adequately trained
6 personnel, as well as properly programmed and maintained augmentative communication
7 devices, [the student] has the potential to successfully utilize augmentative communication
8 devices to functionally communicate in a variety of settings (community, employment) with
9 unfamiliar listeners. She has a large vocabulary, is highly motivated to communicate, is
10 very socially oriented, demonstrates understanding of the communication process, and
11 has the potential to successfully communicate using a higher-tech communication system.
12 Testimony Ms. Curtis, Tr. 67:1-68:9, 69:10-13, 81:11-82:23, 92:16-93:13, 135:7-11, Vol. III,
13 Nov. 10, 2006.
14

15 51. Although [the student] may have made some progress on communication
16 and speech therapy goals in IEPs in effect during the 2004-05 and 2005-06 school years,
17 the recognized need to obtain a specialized augmentative communication assessment and
18 the later failure to allow the IEP team to consider its recommendations, resulted in the IEP
19 having insufficient information to establish appropriate goals and objectives during the
20 2005-2006 school year so that [the student] could develop functional communication skills.
21 Ms. Curtis indicated that in review of [the student]'s goals and objectives, they set forth
22 extremely low expectations. For example, [the student] needed approximately 200
23 opportunities to communicate daily using her Go-Talk communication device, rather than
24 the five times daily set for her in her October 25, 2004 IEP. The goal aimed at having [the
25 student] increase her communication skills by increasing her use of picture choices on a
26 communication board device was not appropriate, as [the student] already demonstrated
27
28

1 the ability to make choices on a communication board or device. Ex. 3, p. 7; Testimony
2 Ms. Curtis, Tr. 99:1-14, 105:21-106:5, Vol. III, Nov. 10, 2006.

3 52. The IEPs in effect for [the student] during the 2004-05 and 2005-06 school
4 years provided only one half-hour per week of speech therapy as a related service.
5 Testimony Speech-Language Therapist, Tr. 22:20-23:1- 4, Vol. III, Nov. 10, 2006.
6 According to Ms. Curtis, this was inadequate for developing [the student]'s functional
7 communication skills. Testimony Ms. Curtis, Tr. 95:23-96:3, vol III, Nov. 10, 2006. Ms.
8 Curtis recommended that one to two hours of speech therapy be provided each week.
9 Testimony Ms. Curtis, Tr. 69:17-24, 95:23-96:19, Vol. III, Nov. 10, 2006; Ex. 26.

11 53. While [the student] has been supported to maintain communication skills she
12 had when she came to the District, her progress in the area of communication does not
13 reflect effective use of the augmentative communication devices to make choices, to
14 initiate narrow, focused requests within the vocabulary made available to her, and to
15 answer academic-styled questions. Testimony Ms. Curtis, Tr. 103:21-105:19, 110:8-112:6,
16 Vol. III, Nov. 10, 2006.

18 54. [The student]'s functional communication skills are essential for her daily
19 living and transition to post-school adult life. The School District's failure to distribute the
20 Augmentative Communication Consultation to the IEP team for their review and
21 discussion, prevented the IEP from developing appropriate measurable annual goals and
22 objectives for [the student] during the 2005-2006 school year to develop her functional
23 communication and deprived her of a free appropriate public education in this area of her
24 education. Testimony Ms. Curtis, Tr. 60:21-80:12, 109:23-112:6, Vol. III, Nov. 10, 2006.

26 55. The School District attempted to discredit the testimony of Ms. Curtis by
27 alleging that her consultation continued to suggest the purchase of equipment and
28 services on an ongoing basis. Ms. Curtis, however, offered credible testimony about the

1 abilities and communication needs of [the student]. While she indicated that she had
2 some of the specialized products that would be helpful to meet [the student]'s communica-
3 tion needs, she qualified that the purchase of these items were at the discretion of the
4 School District. Testimony, Ms. Curtis, Tr. 129:5-133:22. Vol. III, Nov. 10, 2006.

5 56. In the development of [the student]'s transition services, the IEP team looked
6 to [the student]'s parents to help identify her preferences, interests and post-school plans.
7 The Statement of Transition Service Needs in the November 11, 2003 IEP identified [the
8 student]'s preferences and interests as placement in a residential group home. While
9 there was discussion about other potential interests, such as employment, vocational
10 training, and community participation, the IEP team did not identify the need for a
11 functional vocational assessment or exposure to employment opportunities. Ex. 5.
12

13 57. The School District identified its efforts to invite community agencies to
14 participate in the IEP meetings. The October 24, 2004 Transition Services Plan indicates
15 that the School District invited representatives of HI Case Management and Vocational
16 Rehabilitation and that both agencies reported that they would only be duplicating services
17 because [the student] was receiving Intensive Services with Family Outreach. Ex. 3, p. 18.
18 Testimony 2004-2005 Special Education Teacher, Tr: 29:7-39:19, Vol. II, Nov. 9, 2006.
19

20 58. The School District identified its efforts to work on pre-vocational tasks in
21 occupational therapy, such as using wrist weights to improve [the student]'s ability to sort
22 items into containers. The School District also assigned [the student] some job functions,
23 one of which involved delivering the lunch count for her classroom. The 2004-2005 IEP
24 did not identify any activities or strategies for assisting [the student] to transition into
25 employment upon her graduation from high school because this issue had not been
26 identified as something of interest until the parents discussed it in the April 25, 2005
27 meeting and identified it as a Postsecondary Goal in the October 17, 2005 IEP meeting.
28

1 The testimony indicated that when transition services had been discussed previously by
2 the IEP team, it was discussed briefly with no one requesting any modifications, and then
3 the IEP team moved on to the next item for discussion. Testimony, Special Education
4 Director, Tr. 108:25-116:17, Vol. 1, Nov. 8, 2006.

5 59. Nancy Franklin, independent consultant for special education and former
6 special education teacher and administrator, testified for [the student] at the Due Process
7 Hearing. Ms. Franklin has extensive experience teaching students with significant
8 disabilities, in particular high school students, developing and implementing IEPs and
9 transition services plans for such students, coordinating with outside agencies for transition
10 of such students into employment, residential and other post-school settings, and training
11 staff regarding development of appropriate transition services plans under the IDEA.
12 Testimony Ms. Franklin, Tr. 240:18-257:11, 265:20-268:2, Vol. II, Nov. 9, 2006.
13

14 60. Ms. Franklin had interacted with and observed [the student] in several
15 settings: at the mall, at a restaurant, in her family home, and at a baby shower. She
16 reviewed [the student]'s educational records, as well as the transcripts of depositions of
17 the superintendent, special education director, and two classroom teachers. Testimony
18 Ms. Franklin, Tr. 273:1-274:21, Vol. II, Nov. 9, 2006.
19

20 61. Ms. Franklin indicated that the School District should have identified or
21 explained to the parents that vocational assessments could be conducted by the
22 Vocational Rehabilitation Services program within the Montana Department of Public
23 Health and Human Services and should have identified the types of evaluations that could
24 be used. However, given the absence of an interest by [the student] or her parents in
25 pursuing any type of employment and the focus on her transitioning to a residential
26 placement until 2005, it is unreasonable to fault the School District for the IEP team's
27
28

1 failure to secure a vocational assessment or address other employment opportunities in
2 the October 25, 2004 IEP.

3 62. After the School District received notice during the April 25, 2005 IEP
4 meeting and the October 17, 2005 IEP meeting that [the student]'s post-secondary goals
5 included placement at an intensive group home, supported employment and age and
6 interest recreation, the IEP team should have explored in more detail the transition
7 services needed to meet the post secondary goals. Unfortunately, the transition services
8 with regard to a functional vocational assessment and employment as outlined in the
9 October 17, 2005 Statement of Transition Service Needs essentially mirrors the earlier
10 transition plans and did not reflect the services needed to implement [the student]'s
11 individual goals. One essential component would have been a referral for or the
12 development of a functional vocational assessment to better determine [the student]'s
13 interests and strengths for employment. While the IEP notes indicate that this issue was
14 discussed and not needed, the notes of the meeting indicate little more than a discussion
15 that the goals had been set, with no discussion as to the appropriate services needed to
16 implement the goals. Ex. 1.

17
18
19 63. School District personnel who were involved in developing [the student]'s
20 transition services plans were not familiar with customized employment options and the
21 process for identifying and implementing customized employment for students with
22 significant disabilities. The School District, therefore, did not explain customized
23 employment opportunities to [the student]'s parents. The parents, who are not trained
24 special educators or employment specialists but who relied upon the professionals at the
25 District to provide information about potential opportunities available to [the student],
26 learned about customized employment only recently. When they identified this [the
27 student]'s vocational needs and the issue of her potential employment as a postsecondary
28

1 goal, efforts should have been made to identify services or referrals to implement this goal.
2 Testimony Father, Tr. 212:1-213:2, Vol. II, Nov. 9, 2006. The failure of the IEP team to be
3 informed about and discuss employment options for [the student] resulted in the transition
4 service plan in the October 17, 2005 IEP failing to seek a functional vocational assessment
5 that was necessary, at a minimum, to determine [the student]'s transition needs.
6

7 64. The transition services plans in the IEPs dated November 11, 2003, October
8 25, 2004, and October 17, 2005 did not identify any activities or strategies to be
9 implemented by the School District in the area of community experiences. The IEP team
10 designated these activities as the responsibility of [the student]'s parents. The School
11 District personnel indicated that every effort was made to involve [the student] in school
12 activities that involved all of the students, such as sporting events, assemblies and an end-
13 of-year off-campus trip. It was reported that [the student], as arranged by her parents, had
14 opportunity to participate in several ski trips with a community agency and enjoyed
15 bowling. Testimony of 2004-2005 Special Education Teacher, Tr. 175:7-25, Vol. III,
16 November 10, 2006.
17

18 65. With regard to the Transition Services needed for Community Experiences,
19 the Transition Plan was calculated to provide [the student] with adequate services
20 designed to address her individual needs and allowed [the student] to receive meaningful
21 educational benefit. The School District was not responsible for providing additional
22 community experiences as part of [the student]'s transition services.
23

24 66. Pediatric physical therapist Sheri Simkins recommended that a measurable
25 annual physical therapy goal should be included in [the student]'s transition plan so that
26 she would be able to function more independently in a variety of settings. Ex. 21;
27 Testimony Sheri Simkins, Tr:176:16-184:22, 189:17-189:2, Vol. I, Nov. 8, 2006.
28

1 67. Ms. Simkins prepared an assessment which identified [the student] as having
2 a significant delay in gross motor skills. Ms. Simkins developed both functional goals and
3 long term goals for [the student] In her assessment, she recommended that more work
4 should be done in transitioning [the student] from one position to another into order to
5 improve her overall independent mobility. She further noted that if [the student] “is
6 motivated she will attempt to transition independently and is fairly mobile when she would
7 like to participate in an activity.” Ex. 21.

8
9 68. Given the nature of [the student]’s disabling condition it is apparent she will
10 require ongoing physical therapy to maintain and improve her gross motor skills. Upon
11 review of the educational records for 2004 and 2005, significant focus was placed on [the
12 student]’s transitioning from one position to another, use of her prone stander and general
13 physical movement and balance. The physical therapy report indicated that [the student]
14 had been working on independence with wheelchair transfers to and from the floor, and
15 that she had shown success. Additionally, [the student] was receiving adapted Physical
16 Education which addressed increasing her overall body strength and endurance. Ex. 3, p.
17 12, 13; Ex. 1, Bates Stamp 0000369. There is sufficient evidence to demonstrate that [the
18 student] was receiving adequate physical therapy and related services as part of her IEP
19 without the inclusion of physical therapy and related services as an additional component
20 of her Transition Services plan.
21

22 69. [The student]’s father indicated that Extended School Year (ESY) services
23 were declined each year because the family had been required to financially provide for
24 the paraprofessional aide and transportation in 2000 when ESY services were required
25 under [the student]’s IEP. Testimony Father, Tr. 222:4-225:5, Vol. II, Nov. 9, 2006.

26 70. The minutes from the IEP meetings indicate that Extended School Year
27 (ESY) services were offered each year for [the student], except for the summer of 2006,
28

1 but these services were repeatedly declined by [the student]’s parents. In the November
2 11, 2003 IEP, it is noted that the “Parents Don’t Want” ESY. The minutes of the April 25,
3 2005 IEP meeting indicate a comment from the parents regarding ESY which states, “In
4 the past wasn’t worth the travel. Didn’t like the amount of time available or the teacher.”
5 Petitioner’s Ex. 2, p. 5. While it is possible that [the student] could have benefited from
6 ESY services, there is no evidence to support a finding that the School District failed to
7 provide FAPE to [the student] by not mandating ESY services. It is apparent that [the
8 student]’s parents are educated, fully aware of [the student]’s needs, and that they actively
9 involved [the student] in family activities and travel. [The student]’s parents’ decision to
10 deny ESY services was knowing and appropriately respected by the IEP team.
11 Additionally, [the student’s special education teachers indicated that [the student] did not
12 regress in her skills during the summer break. Testimony of Special Education Director,
13 Tr. 117:25-121:4, Vol. 1, Nov. 8, 2006.
14

15
16 71. Extensive pages of school documents were provided for the 2004-05 and
17 2005-06 school years. Many of these documents demonstrate the School District’s
18 comprehensive efforts to provide [the student] with special education and related services
19 to [the student], and [the student]’s progress toward the goals and objectives of her IEPs.
20

21 72. The efforts of [the student]’s parents and the School District to communicate
22 generally about the welfare of [the student], her interests, her daily care needs and her
23 behaviors were extensive and meaningful. Both parties continued to use a variety of
24 methods to communicate essential information about [the student] even when there were
25 issues in dispute. The parties’ actions indicate their concern, compassion and desire to
26 act in the best interests of [the student].

27 73. Linda Maass (“Dr. Maass”) testified on behalf of the School District. A
28 curriculum vita for Dr. Maass was entered into evidence. Ex. 2019-2021. This document

1 demonstrates that Dr. Maass has extensive education and experience in the provision of
2 special education services in Montana, that her education includes an Ed.D degree in
3 2005 from the University of Montana in Educational Leadership based in part on a
4 dissertation entitled "Special education and the least restrictive environment: U.S. Federal
5 Appeal Court Outcomes and Expert Testimony," and that her experience entails more than
6 30 years working in special education, including the past five years as the Director of the
7 Missoula Area Education Cooperative.

8
9 74. Dr. Maass indicated that she reviewed [the student]'s special educational file,
10 the depositions that had been taken prior to the hearing and interviewed some of the
11 School District personnel. Dr. Maass was of the opinion that the School District properly
12 graduated [the student] with a regular education diploma and that the School District and
13 parents had exceeded the FAPE standard for meaningful participating in the IEP and
14 educational processes during the 2004-2005 and 2005-2006 school year. Testimony Dr.
15 Maass, Tr. 74:3-77-16, Vol. IV, Nov. 13, 2006.

16
17 75. Dr. Maass was of the opinion that the IEP team developed goals that were
18 reasonably calculated to provide educational benefit, that [the student] made satisfactory
19 progress on the goals and received educational benefit from the IEPs in both the 2004-
20 2005 and 2005-2006 school years. Dr. Maass further indicated that her opinions were
21 based on her collective review of the IEP documents and not a substantive analysis of how
22 well the goals and objectives met [the student]'s needs. Testimony Dr. Maass, Tr. 75:6-21,
23 138:6-21, Vol. IV, Nov. 13, 2006.

24
25 76. While Dr. Maass discussed the awarding of credits for students with
26 significant disabilities, she later testified that the basis of determining whether a student
27 with significant disabilities graduates is based on the student's IEP. Testimony of Dr.
28 Maass, Tr. 122:23-126:12, Vol. IV, Nov. 13, 2006.

1 77. Further, Dr. Maass noted that if [the student] appropriately graduated in May
2 2006, ESY services would not be required; if [the student] had not graduated in May 2006,
3 the IEP would need to reconvene to determine whether ESY services would be required.
4 Testimony Dr. Maass, Tr. 84:7-85:12, Vol. IV, Nov. 13, 2006.

5 78. When asked whether a school district should provide an evaluation to the
6 IEP team for review if the school district sought the evaluation to determine more
7 information about a student's needs, Dr. Maass indicated that "outside evaluations are
8 required to be considered by IEP teams." Testimony Dr. Maass, Tr. 102:5-102:19, Vol. IV,
9 Nov. 13, 2006. However, despite extensive inquiry, Dr. Maass did not testify that failure to
10 consider an outside evaluation would necessarily rise to the level of a substantive
11 procedural violation. She did, however, acknowledge generally that the IEP team was
12 required to review all evaluations. Testimony Dr. Maass, Tr. 102:20-109:24, Vol. IV, Nov.
13 13, 2006.
14
15

16 79. The only procedural violation identified by Dr. Maass involved the School
17 District's failing to provide a summary of performance document, but she further opined
18 that this was not a denial of FAPE because the information required for this summary was
19 provided in other documents. Testimony, Dr. Maass, Tr. 81:3-82:7, Vol. IV, Nov. 13, 2006.

20 80. The Conclusions of Law that also constitute Findings of Fact are
21 incorporated by reference.
22

23 **CONCLUSIONS OF LAW**

24 Based upon the above Findings of Fact, the Conclusions of Law of this hearing
25 officer are as follows:

26 1. The Findings of Fact that also constitute Conclusions of Law are
27 incorporated by reference.
28

1 2. Since the date of the enactment of the Education for All Handicapped
2 Children Act of 1975, Congress has passed amended versions of the Act and renamed it
3 the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et. seq. The
4 primary purpose of the IDEA is: "to ensure that all children with disabilities have available
5 to them a free appropriate public education which emphasizes special education and
6 related services designed to meet their unique needs and prepare them for further
7 education, employment, and independent living; . . ." 20 U.S.C. § 1400(d)(1)(A) (2004).
8 (The 1997 version of the IDEA states the same purpose, with the exception that the term
9 "further education" was added in 2004.)

11 3. The requirements of the 1997 IDEA apply to disputes regarding the
12 appropriateness of [the student]'s education prior to July 1, 2005, whereas the IDEA, as
13 amended in 2004, applies to disputes regarding [the student]'s education after July 1, 2005
14 (the effective date of IDEA 2004).

16 4. The IDEA has been implemented on the federal level by the adoption of
17 regulations found at 34 C.F.R. Part 300. The federal regulations adopted in 1999 to
18 implement IDEA 1997 clearly apply before the effective date of IDEA 2004, July 1, 2005.
19 After July 1, 2005, the statutory language of IDEA 2004 is controlling; the 1999 federal
20 regulations that do not conflict with IDEA 2004 apply as well. Federal regulations
21 implementing IDEA 2004, though not effective until October 13, 2006, provide guidance as
22 to the Department of Education's interpretation of IDEA 2004 for the time period after the
23 effective date of the 2004 IDEA and are cited to herein for that purpose only.

25 5. The Individualized Education Program (IEP) is the means by which the "free
26 appropriate public education" (FAPE) required by the IDEA is tailored to the unique needs
27 of the student. Town of Burlington Sch. Comm. v. Dept. of Educ., 471 U.S. 359, 368
28 (1985).

1 6. The IDEA mandates “A free appropriate public education is available to all
2 children with disabilities residing in the State between the ages of 3 and 21, inclusive,
3 including children with disabilities who have been suspended or expelled from school.” 20
4 U.S.C. § 1412(a)(1)(A)(1997, 2004).
5

6 7. However IDEA limits its application when State law or practice is in conflict
7 with the provision of FAPE to children aged 3 through 5 and 18 through 21. As set forth in
8 20 U.S.C. § 1412(a)(1)(B) (1997, 2004):
9

10 The obligation to make a free appropriate public education available to all
11 children with disabilities does not apply with respect to children — (i) aged 3
12 through 5 and 18 through 21 in a State to the extent that its application to
13 those children would be inconsistent with State law or practice, or the order
14 of any court, respecting the provision of public education to children in those
15 age ranges.

16 8. Additionally, children with disabilities who have graduated from high school
17 with a regular diploma are no longer entitled to receive a free appropriate public education
18 (FAPE). 20 U.S.C. § 1414(c)(5)(B)(i)(2004); *see also*, 34 C.F.R. §.122(a)(3)(1999); 34
19 C.F.R. § 300.102(a)(3) (October 13, 2006).
20

21 9. A student’s statutory entitlement to FAPE continues until the student earns
22 and is awarded a regular diploma or until the student reaches the maximum age of
23 eligibility under State law or practice, whichever occurs first. 20 U.S.C. §§ 1412(a)(1)(B),
24 1414(c)(5)(B)(I) (2004).
25

26 10. To determine [the student]’s statutory entitlement to continued services under
27 the IDEA, the following two issues must be determined: (1) whether State law or practice
28 terminated [the student]’s right to FAPE upon reaching 19 years of age on August 31, 2006
and (2) whether [the student] earned a regular high school diploma.

1 **I. According to Montana Law and School District Policy, [the**
2 **student] reached the maximum age of IDEA eligibility upon attaining**
3 **age 19**

4 11. The maximum age of eligibility under the IDEA for special education is 22, as
5 21 year olds are included within the range of ages to which FAPE applies. However, for
6 students ages 18 through 21, Montana law or practice determines the maximum age of
7 eligibility for special education and related services under federal and state laws. 20 U.S.C.
8 § 1412(a)(1)(B) (1997, 2004).

9 12. Under Montana law, a child is statutorily entitled to attend school “when the
10 child is 6 years of age or older on or before September 10 of the year in which the child is
11 to enroll but is not yet 19 years of age. Mont. Code Ann. § 20-5-101(1)(a). A child is
12 entitled to receive special education services through age 18. Mont. Code Ann. § 20-7-
13 411(2) (2005).

14 13. Montana law allows the trustees of a school district the discretion to admit a
15 child who is 19 years of age or older if there are exceptional circumstances. Mont. Code
16 Ann. § 20-5-101(3). School district trustees also are given discretion to establish and
17 maintain a special education program for a child with a disability who is 19 years of age or
18 older and under age 22 years of age. Mont. Code Ann. § 20-7-411(4) (2005).

19 14. [The student] was not entitled to receive educational services at the School
20 District during the 2006-2007 school year because she attained age 19 before September
21 10, 2006. The School District was not required under Montana law to provide special
22 education services to [the student] after she attained age 19 on August 31, 2006.

23 15. Montana’s statutes permit a school district board of trustees to establish and
24 implement any “policies and procedures for the conduct of special education that are
25 26
27 28

1 consistent with the Individuals With Disabilities Education Act and with state laws and rules
2 of the board of public education and the superintendent of public instruction.” Mont. Code
3 Ann. § 20-7-414(2) (2005).

4
5 16. The School District board of trustees established a variety of policies that
6 were the subject of scrutiny during these proceedings. None of these policies mandate the
7 provision of special educational services to individuals ages 19 through 22. Further, these
8 policies are in compliance with Montana law.

9
10 17. The only exception that could have required the School District to provide
11 educational services for [the student] during the 2006-2007 school year would be if the
12 School District were providing educational services to a non-disabled child age 19 or older.
13 34 C.F.R. § 300.300(b)(2) (1999). As was established prior to the hearing, the School
14 District currently is not providing educational services to any student age 19. Affidavit of
15 Superintendent, dated September 1, 2006; *see also* ORDER REGARDING “STAY PUT”
16 MOTION, previously filed in this matter.

17
18 18. Therefore, while Federal law would allow services to be provided to [the
19 student] until she attained age 22, Montana law does not mandate the provision of
20 educational services by the School District to [the student] after age of 19; and Montana
21 law controls in this circumstance. The provision of special education services to [the
22 student] was discretionary with the School District after August 31, 2006.

23
24 19. In summary, [the student]’s statutory entitlement to FAPE continued until she
25 attained age 19 on August 31, 2006, when she reached the maximum age of eligibility
26 under Montana law.
27
28

1 20. Notwithstanding the conclusion that [the student] reached the maximum age
2 of eligibility in the School District for services under IDEA when she attained age 19, the
3 issues of whether [the student] was properly awarded a diploma and whether she was
4 provided FAPE by the School District must be addressed.
5

6 **A. [THE STUDENT] Did Not Earn a Regular Diploma**

7 21. The IDEA does not specify the precise requirements that must be met for a
8 student to earn a regular diploma.

9 22. The determination of whether a student has earned a regular diploma is
10 made pursuant to State law. Establishment of appropriate substantive standards for
11 graduation is a matter of state law for both disabled and non-disabled students. Letter to
12 Anonymous, 22 IDELR 456 (OSEP 1994).
13

14 23. Under Montana law, a student is eligible for a regular diploma if he or she
15 meets one of the following two conditions. The student must either earn the required
16 number of credits, as specified in Administrative Rules of Montana § 10.55.905-906, or
17 successfully complete the goals identified in an Individualized Educational Program (IEP),
18 as specified in Administrative Rules of Montana §10.55.805(4); *see also*, § 10.16.3345(5).
19

20 **B. The District's Award of Credits to [the student] Was Not Valid; [the**
21 **student] Did Not Earn the Required Credits for Graduation Under**
22 **Montana Law**

23 24. Montana law requires a minimum of 20 units of credit for graduation, Admin.
24 R. Mont. §§ 10.55.905(1) and 906(1); 13 of the 20 required credits must be in content
25 areas specified by § 10.55.905. The 20 units must be aligned with and enable students to
26 meet the "content and performance standards" adopted by the State of Montana. Admin.
27 R. Mont. § 10.55.904. Local school districts are required to incorporate all content and
28

1 performance standards into their curriculum, implement the standards, and assess the
2 progress of all students in meeting the standards. Admin. R. Mont. §§ 10.55.603(1),
3 10.55.1001.

4 25. “Content standard” means what all students should know, understand, and
5 be able to do in a specific content area, such as reading, mathematics, or social studies.
6 Admin. R. Mont. § 10.54.2502(2). “Performance standard” means the specific
7 expectations for performance in each content area. Admin. R. Mont. § 10.54.2502(4).
8 There are four performance levels: advanced, proficient, nearing proficiency, and novice.
9 Admin. R. Mont. §§ 10.54.2501, 2502(3). A unit of credit may only be given for
10 “satisfactory completion of a full-unit course.” Admin. R. Mont. § 10.55.906(1). Thus, for a
11 student to earn the 20 credits required for graduation with a regular high school diploma
12 under Administrative Rules of Montana § 10.55.906(1), the student must have met
13 minimum performance standards in those content areas. The earning of credits for a high
14 school diploma is, under Montana law, inextricably linked to the regular academic
15 curriculum.
16

17 26. Many students with disabilities who receive instruction and related services
18 under the IDEA will satisfactorily complete full-unit courses in the academic areas specified
19 by Montana law and thus, earn credits. Some students with disabilities will not.
20

21 27. As a student with significant and numerous disabilities, [the student] has
22 followed an alternate curriculum based solely on her individual needs. Her IEPs include
23 goals related to such basic skills as personal care and grooming, physical mobility, and
24 communication with an augmentative communication device, and include related services
25 of physical therapy, occupational therapy and speech therapy. Due to the extent of her
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1 disabilities, the educational goals set for [the student] do not meet or align with the
2 Montana Board of Public Education's specific academic content requirements. [The
3 student] did not satisfactorily complete full-unit courses in the identified academic areas, as
4 needed to earn the 20 units of credit required for graduation by Administrative Rules of
5 Montana § 10.55.906(1). Consequently, [the student] has not earned the 24 credits
6 awarded to her by the School District and therefore, was not entitled to receive or required
7 to accept a regular high school diploma based on earned credits in either May 2005 or
8 May 2006.
9

10
11 28. No statute or administrative regulation in Montana authorizes the awarding of
12 credits for successful completion of individual goals on a student's IEP.

13 29. In summary, under Montana law, the earning of credits is tied to academic
14 achievement in the content areas specified by Montana law, not the achievement of IEP
15 goals. The successful completion of IEP goals is an alternate method of earning a regular
16 high school diploma in Montana; it is not a basis for awarding "units of credit."
17

18 **C. The IEP Team Did Not Determine that [the student] Earned a Regular**
19 **Diploma Based on Successful Completion of IEP Goals**

20 30. Procedural compliance is essential to ensuring that every eligible child
21 receives a FAPE. Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 887, 891 (9th Cir.
22 2001). Procedural inadequacies that result in the loss of educational opportunity or
23 seriously infringe the parents' opportunities to participate in the IEP formulation process
24 clearly result in the denial of FAPE. Amanda J., 267 F.3d at 891; W.G. v. Bd. of Trustees
25 of Target Range, 960 F.2d 1479, 1484-85 (9th Cir. 1992).
26

27 31. Graduation with a regular diploma is a significant change in educational
28 placement, for which a student is entitled to the procedural protections of the IDEA. The

1 procedural protections of the IDEA require that prior written notice be provided to the
2 parents. 34 C.F.R. § 300.122(a)(3)(iii) and 34 C.F.R. § 300.503 (1999). Cronin v. Board
3 of Education, 689 F. Supp. 197, 203 (S.D. N.Y. 1988) *citing* Stock v. Massachusetts Hosp.
4 School, 467 N.E.2d 448, 453 (Mass. 1984), *cert. denied*, 474 U.S. 844 (1985).

5
6 32. When a decision to terminate the special education and related services to a
7 child with a disability is based on the child's educational progress and accomplishment of
8 the child's IEP goals and objectives, that decision must be made by the IEP team during a
9 properly convened IEP meeting. Letter to Hagen-Gilden, 24 IDELR 294 (Feb. 6, 1996).
10 Thus, when the District proposes to award a student a diploma based upon successful
11 completion of IEP goals, rather than based upon credits earned for achieving proficiency
12 with respect to the standard curriculum, it is an IEP team decision.

13
14 33. As determined in the Findings of Facts above, the IEP team did not meet to
15 review [the student]'s IEP to assure that the School District's graduation requirements
16 were met at the time requested by the parents, which was near the proposed graduation
17 date.

18
19 34. The School District failed to comply with IDEA procedural requirements when
20 it denied the parents' request for an IEP meeting in April 2006. 20 U.S.C. § 1414(d)(3)(A)
21 & (d)(4)(A); *see also*, 34 CFR § 300.346(a) & (b)(199); 34 CFR § 300.324(a)(1) &
22 (b)(1)(2006).

23
24 35. To summarize, the School District's award of a regular high school diploma
25 to [the student] violated her right to FAPE under the IDEA. As a result of both [the
26 student]'s failure to earn the required credits for graduation, pursuant to Administrative
27 Rules of Montana § 10.55.906(1), and a lack of review by the IEP team as to whether [the
28

1 student] successfully completed the goals of her IEP, [the student] did not earn a regular
2 high school diploma under Montana law.

3 36. Therefore, [the student]'s diploma should be rescinded until the IEP team
4 determines that [the student] has successfully completed the goals in her IEP.
5

6
7 **II. School District Failed to Provide FAPE During the 2005-2006**
8 **School Year in the Areas of Communication and Transition Services**
9 **regarding Functional Vocational Assessment and Employment**

10 37. The determination as to whether [the student] received a free appropriate
11 public education has two parts. First, it must be determined whether the school district
12 complied with the procedures set forth in the IDEA, 20 U.S.C. §§ 1400 *et. seq.* (1997,
13 2004), for the development of the Individualized Education Program (IEP). Second, it must
14 be determined whether the IEP is reasonably calculated to enable the child to receive
15 meaningful educational benefit. Board of Education v. Rowley, 458 U.S. 171, 206-07
16 (1982).
17

18 **A. Development of the IEP: [the student] was Denied FAPE as to Her**
19 **Functional Communication Needs**

20 38. The School District repeatedly received concerns from the parents that [the
21 student] was not making satisfactory progress in the areas of functional communication
22 skills. These concerns were addressed in detail by the parents at the IEP team meeting
23 held on April 25, 2005. After discussing these concerns, the IEP team determined the
24 need for an augmentative communication consultation and the School District obtained this
25 evaluation from Ms. Curtis before the conclusion of the 2005-2006 school year.
26

27 39. In response to the parents' expressed concerns about [the student]'s lack of
28 progress in developing functional and social communication skills, the District acted

1 properly in obtaining an augmentative communication evaluation from an augmentative
2 communication specialist. (Exs. 26, 27). However, the District's subsequent failure to
3 share the results of the evaluation with the members of the IEP team, including [the
4 student]'s parents, and to consider the evaluation results in revising [the student]'s IEP at
5 the October 17, 2005 IEP meeting or at any other time, resulted in several procedural
6 violations of the IDEA.

8 40. The IDEA imposes an affirmative obligation to evaluate children with
9 disabilities. Seattle School Dist. No. 1 v. B.S., 82 F.3d 1493, 1499 (9th Cir. 1996).

11 41. Once the District obtained the evaluation from the augmentative
12 communication specialist, it was required to consider the results of that evaluation in
13 developing and revising [the student]'s IEP. 20 U.S.C. § 1414(d)(3)(A)(iii), (d)(3)(B)(iv)-(v),
14 & (d)(4)(A)(I) (2004).

15 42. The District failed to comply with its duty to revise the IEP as appropriate to
16 address the results of the evaluation and [the student]'s communication needs. 20 U.S.C.
17 § 1414(d)(4)(A)(ii) (2004); Kevin T. v. Elmhurst, 2002 WL 433061, *10, *11 (N.D. Ill. 2002).
18 The October 17, 2005 IEP was the only IEP developed for [the student] following the
19 evaluation and it fails to incorporate any goals, services or instructional strategies
20 recommended by the specialist. The District failed to implement most of the
21 recommendations made by the augmentative communication specialist. The evidence
22 establishes [the student]'s need for those recommendations to be implemented, therefore
23 the District's failure to do so was both a procedural violation and a substantive denial of
24 FAPE. See, Amanda J., 267 F.3d at 894 (Failure to consider evaluation results that child
25 had autism rendered "the accomplishment of the IDEA's goals – and the achievement of
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1 FAPE – impossible.”). The District’s failure in this regard resulted in a loss of educational
2 opportunity for [the student].

3 43. As addressed in the Augmentative Communication Consultation, to develop
4 functional communication skills, [the student] has needed appropriate assistive technology
5 devices and services. These devices and services are required under IDEA pursuant to
6 20 U.S.C. §1401(1) & (2). While the School District took action to provide augmentative
7 communication devices, as well as other low tech devices, many of these devices were out
8 for repair for extended periods of time or were otherwise not functioning or programmed to
9 meet her individual needs.
10

11 44. The School District provided a wide array of assistive devices to [the student]
12 to assist with her communication and speech therapy goals in IEPs, however, after
13 receiving the recommendations from the Augmentative Communication Consultation, it
14 became clear that the goals and objectives set by the IEP team provided unduly low
15 expectations and were not aimed at enabling [the student] to develop functional
16 communication skills. Further, the IEP team set goals and objectives for 2005-2006
17 without the benefit of these recommendations. The District’s failure to provide appropriate
18 instruction and related services by adequately trained personnel, as well as properly
19 programmed and maintained augmentative communication devices, deprived [the student]
20 of a FAPE during the 2005-2006 school year. Considering that [the student] has the
21 potential to successfully utilize augmentative communication devices to functionally
22 communicate in a variety of settings (community, employment), the District’s failure to
23 develop her functional communication skills has not enabled her to receive educational
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1 benefit and has deprived her of FAPE. See Hamilton County Bd. Of Educ. v. Deal, 392
2 F.3d 840, 864 (6th Cir. 2004).

3 45. The evidence establishes that to receive FAPE, [the student] needs speech
4 therapy services at least one to two hours per week. The District's failure to provide this
5 amount of related services also denied FAPE to [the student] during the 2005-2006 school
6 year.
7

8
9 **B. 2005-2006 IEP Transition Services Plan Did Not Provide FAPE to [the**
10 **student].**
11

12 46. Transition services must be designed within a results-oriented process that is
13 focused on improving the academic and functional achievement of the student to enable
14 her to move from school to post-school activities. 20 U.S.C. § 1401(34) (2004).

15 47. The specific services to be offered in a transition plan include: (1) instruction,
16 (2) related services, (3) community experiences, (4) development of employment and other
17 post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills
18 and a functional vocational evaluation. 34 C.F.R. § 300.43 (2006). The transition plan for
19 the 2005-2006 School Year, which was developed for [the student] lacked activities,
20 strategies and services in the area of a functional vocational assessment and employment,
21 which had been identified by her parents and the IEP team as a Postsecondary goal in the
22 2005-2006 IEP.
23
24

25 48. While the School District took action to obtain the participation of outside
26 agencies in developing and providing for other Transition Services, the lack of response by
27 the IEP team and the School District in identifying the need for some type of vocational
28

1 assessment and making the appropriate referrals and/or steps to accomplish such an
2 assessment resulted in the failure to provide an appropriate Transition Plan during the
3 2005-2006 School Year.

4
5 49. In prior IEPs, the IEP team had developed [the student]'s postsecondary
6 goals after receiving information from her parents and other team members, identified
7 appropriate Transition Services and designated the responsible agency or person who
8 would be implementing the services. The Transition Plan in the 2004-2005 IEP was
9 reasonably calculated to meet [the student]'s unique and specifically identified needs was
10 implemented by the School District with the assistance of the identified parties/agencies
11 and provided [the student] with FAPE.

12
13 50. Additionally, except as the above findings and these conclusions otherwise
14 provide, the School District developed and implemented IEPs for [the student] that were
15 reasonably calculated to enable her to derive meaningful educational benefit in both the
16 2004-2005 School Year and in the 2005-2006 School Year.

17
18 **C. Failure to Provide ESY During 2004, 2005 Did Not Deny [the student]**
19 **FAPE**

20 51. Extended school year services (ESY) must be provided to a student, at no
21 cost to the parents of the student, if the services are necessary for the provision of FAPE.
22 34 C.F.R. § 300.309(1999); 34 C.F.R. § 300.106 (2006).

23
24 52. Numerous factors may be considered by an IEP team when determining
25 whether ESY services are appropriate. These factors include: "the degree of impairment,
26 the degree of regression suffered by the child, the recovery time from this regression, the
27 ability of the child's parents to provide the educational structure at home, the child's rate of
28

1 progress, the child's behavioral and physical problems, the availability of alternative
2 resources, the child's ability to interact with nonhandicapped children, the areas of the
3 child's curriculum which need continuous attention, the child's vocational needs, and
4 whether the requested service is extraordinary for the child's condition, as opposed to an
5 integral part of a program for those with the child's condition." See Johnson v. Indep. Sch.
6 Dist. No. 4, 921 F.2d 1022, 1031, note 9. (10th Cir. 1990).

8 53. Except for the summer of 2003 when the IEP team determined that ESY
9 services were appropriate, ESY services have been addressed by the IEP and declined by
10 [the student]'s parents. [The student]'s parents maintain that they were required to pay for
11 some of the services that [the student] received during the summer of 2003. This was not
12 clear from the evidence. In examining the evidence available at the hearing, it appeared
13 more likely that [the student]'s parents did not want ESY services either because these
14 services were inconvenience or because the services did not provide sufficient meaningful
15 benefit to [the student] to warrant the disruption of family activities, in the parents view.
16 The IEP team respected the parents' opinion as to ESY services and did not mandate the
17 provision of these services. Therefore, the IEP team decision that ESY services not be
18 provided during the ESYs of 2004 and 2005 did not constitute a denial of FAPE for [the
19 student].

22 54. The decision as to whether [the student] should have been provided ESY
23 benefits during ESY 2006, however, was not a decision that was fully considered by the
24 IEP team because the team did not have the opportunity to determine whether [the
25 student] successfully completed the goals identified on the 2005-2006 IEP and was
26 entitled to graduate. While there is a history of the parents denying ESY services, the IEP
27
28

1 team could have recommended the provision of ESY services for [the student] if she had
2 not successfully completed her goals because did not age out of special education
3 services until her birthday on August 31, 2006. Therefore, the IEP team should convene to
4 determine whether [the student] was appropriate to graduate and, if not, whether she
5 should have been provided with ESY services until she attained age 19.
6

7 55. In considering whether [the student] was entitled to receive ESY services for
8 the summer of 2006 until she attained age 19, the IEP team should consider all relevant
9 factors, including but not limited to the education time that [the student] missed because of
10 illness, the nature and severity of [the student]'s disability, and her rate of progress in
11 attaining functional communication skills.
12

13 **III. [The student] has Met Her Burden and Is Entitled to Relief As**
14 **Set Forth in this Opinion**

15 56. Under the IDEA, the burden of proof in an administrative hearing challenging
16 the appropriateness of an Individualized Education Program (IEP) is on the party seeking
17 relief, which in this case is [the student], the student. Schaffer v. Weast, 126 S. Ct. 528,
18 531 (2005).
19

20 57. This hearing officer has heard all the evidence, weighed it thoroughly, and
21 has determined that [the student] was not provided FAPE by the School District in a
22 number of specific areas during the 2005-2006 School Year, as set forth in this opinion.
23 Where findings have been made regarding the School District failing to provide FAPE to
24 [the student], this hearing officer has found the parents' evidence to be more thorough,
25 credible and persuasive and, in these areas, finds that [the student] has met her burden of
26 proof. In all other areas, this hearing officer has found that [the student] did not meet her
27 burden of proof and finds that the School District provided [the student] with FAPE.
28

58. Compensatory education services can be awarded as appropriate equitable relief for a past denial of FAPE. Park v. Anaheim Union High School District, 464 F.3d 1025, 1033 (9th Cir. 2006).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the following relief is granted:

1. The regular high school diploma awarded to [the student] by the District is hereby rescinded. [The student]'s current status is that of a student who has not met graduation requirements and who continues to be entitled to special education and related services under the IDEA. The IEP team shall meet to determine whether [the student] has successfully completed the goals identified on the 2005-2006 IEP for high school completion and whether she should be awarded a diploma.

2. The School District will provide [the student] with appropriate compensatory education services as a remedy for the District's failure to provide FAPE during the 2005-2006 school year (or until she attained the age of 19) as to the provision of functional and social communication services and for transition services in the area of a functional vocational assessment and employment. The compensatory education services shall be designed by the IEP team to address the School District's failure to provide [the student] with appropriate augmentative communication services and transition services, as set forth in this opinion, and to include transitional services in the areas of Functional Vocational Assessment and Employment as determined to be appropriate by the IEP team. The compensatory education services will provide FAPE, consistent with findings and conclusions of this decision.

3. Within 45 calendar days of receipt of this Order, unless otherwise agreed to by the parties, the School District will convene an IEP team meeting to address whether [the student] graduated from the School District and should be awarded a diploma, and to discuss and arrange for the provision of compensatory education in accordance with the findings and conclusions of this decision.

DATED this ____ day of January, 2007.

Leslie Halligan, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2007 I caused a true and accurate copy of the foregoing to be served upon the following:

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